

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JOSE ACOSTA, :
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Petitioner, :
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-against- :
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PATRICK GRIFFIN, :
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Respondent. :
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11 Civ. 8724 (LGS)(RLE)

ORDER & OPINION

LORNA G. SCHOFIELD, District Judge:

Petitioner filed his request for habeas relief (Dkt. No. 1) on November 14, 2011, pursuant to 28 U.S.C. § 2254. He then filed the amended Petition (Dkt. No. 7) on February 2, 2012, alleging ineffective assistance of counsel, and challenging the sentencing court's application of the New York Persistent Felony Offender Statute. On September 3, 2013, Magistrate Judge Ellis issued the Report (Dkt. No. 25), recommending that the Petition be denied. This Court adopted that Report, having received no objection from the Petitioner, on October 3, 2013. On October 8, 10, and 17, the Court received correspondence from Petitioner that he had requested an extension to file his objections. The Court has considered Petitioners objections, notwithstanding concerns regarding timeliness. *See Sanford v. Lee*, No. 11 Civ. 5714, 2012 WL 3062692, at *1 (S.D.N.Y. July 25, 2012).

A district court reviewing a magistrate judge's report and recommendation "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C). A district court reviews the report strictly for clear error where no objection has been made, and makes a *de novo* determination regarding those parts of the report to which objections have been made. *McDonough v. Astrue*, 672 F. Supp. 2d 542, 547 (S.D.N.Y.2009) (citation omitted). When a party makes only conclusory or general objections,

or simply reiterates the original arguments, the Court will review the report strictly for clear error. *Crowell v. Astrue*, No. 08 Civ. 8019, 2011 WL 4863537, at *2 (S.D.N.Y. Oct. 12, 2011) (citing *Pearson–Fraser v. Bell Atl.*, No. 01 Civ. 2343, 2003 WL 43367, at *1 (S.D.N.Y. Jan. 6, 2003)).

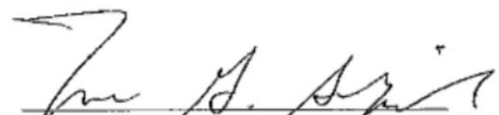
Petitioner makes one specific objection to Magistrate Judge Ellis’s Report, objecting to Magistrate Judge Ellis’s finding that Petitioner’s appellate counsel’s conduct did not meet the standard from *Strickland v. Washington* for ineffective assistance of counsel when he did not attack the constitutionality of New York’s persistent felony offender statute. *Strickland v. Washington*, 466 U.S. 668 (1984). Reviewing Magistrate Judge Ellis’s decision *de novo*, the Court agrees with Magistrate Judge Ellis’s Report. Petitioner’s counsel’s decision not pursue the constitutionality of New York’s persistent felony offender statute, given the Second Circuit’s opinion in *Portalatin v. Graham*, 624 F.3d 69, 73 (2d Cir. 2010), was not objectively unreasonable.

Having reviewed the rest of Petitioner’s objections to the Report, he raises no specific objections to Magistrate Judge Ellis’s Report, and merely reiterates arguments previously raised. As the Court previously held, Magistrate Judge Ellis’s Report contains no clear error. Accordingly, the Court ADOPTS the Report in its entirety as the decision of the Court. Petitioner’s request for a writ of habeas corpus is denied. A certificate of appealability shall not be issued, as Petitioner has made no substantial showing of the denial of a constitutional right.

The Clerk is directed to serve a copy of this Order to Petitioner.

SO ORDERED.

Dated: October 18, 2013
New York, New York



LORNA G. SCHOFIELD
UNITED STATES DISTRICT JUDGE